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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re M.M., a Person Coming Under the  
Juvenile Court Law.

B208488  
(Los Angeles County  
Super. Ct. No. CK70739)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

M.M.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County.

Marguerite Downing, Judge. Affirmed.

Jack A. Love, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens and Frank J. DaVanzo, Deputy County Counsel for Plaintiff and Respondent.

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M.M. appeals from the jurisdictional and dispositional orders in the dependency proceedings concerning his daughter M. We affirm.

#### Facts

M., who was born in September 1993, was 14 years old when the dependency was initiated. Her paternal grandmother ("Grandmother") had been her legal guardian since May of 1994. She lived with Father, Grandmother, who suffered from diabetes, high blood pressure, and other problems, an uncle, and an adult cousin who helped care for Grandmother. M. visited her mother, who was only 15 when M. was born, and who had consented to the guardianship. Father was M.'s primary caretaker.

M. came to the attention of DCFS on November 13, 2007, after Sherriff's deputies arrested Father on felony charges related to the sale of nitrous oxide to minors. (Bus. & Prof. Code, § 4336; Health & Saf. Code, § 11352.) The arrest took place in the family's apartment, while M. was at school. Grandmother was not present because she was in the hospital.

The Sheriff's Incident Report, in evidence at the Welfare and Institutions Code<sup>1</sup> section 300 hearing, says that the arrest was made after a search warrant was executed. In Father's bedroom, deputies found printed information on criminal violations on sale of nitrous oxide, and the keys to his truck, on his key ring. The truck was parked in the visitors' section of the apartment building's parking lot and appeared to be immobile. Inside, deputies found two cylinders of nitrous oxide, eight empty cylinders, a refill pump, the kind of scale used to weigh air tanks, customer release forms, and small broken pieces of balloons. Deputies told DCFS that balloons were commonly used by nitrous oxide users to temporarily store the gas and that they believed that the equipment indicated that Father was involved in illicit sales of nitrous oxide. Father told deputies

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

that the equipment was part of his work, cylinder testing and repair. He could produce no business license or business records.

The search warrant application is not in our record, but in the Incident Report, Sheriff's Deputy Jeff Alvarado wrote that Father was known to sell nitrous oxide to minors as an inhalant and that prior to the service of the warrant, he had been observed (and recorded on digital surveillance cameras) conducting numerous metal cylinder exchanges from the truck during late night hours. Later, the social worker spoke to Detective Escalante, who said that he was certain that Father was aware that the people he sold nitrous oxide to were going to use the gas as an inhalant. When asked about the ages of Father's customers, Detective Escalante said that they were "kids. Very young juveniles." Detective Escalante also said that the surveillance had gone on for a couple of months, that the sales occurred in the evening, and that nitrous oxide inhalation could be deadly.

M. was detained and placed in foster care, and a section 300 petition was filed. At the detention hearing, she was released to Grandmother, with monitored visits for Father.

The section 300 petition was brought under subdivision (b) as to Father, with factual allegations concerning possession of nitrous oxide and drug trafficking. There were also allegations about Mother, essentially that she had failed to provide for M., but when DCFS learned about the legal guardianship those allegations were dismissed and an amended petition was filed. The new petition repeated the allegations about Father and also alleged, under subdivision (b), that Grandmother knew or should have known that Father was selling nitrous oxide, and that she had thus endangered M.

The adjudication hearing took place on February 19, 2008. DCFS's reports were entered into evidence, and M. and Father testified.

In pertinent part, the evidence was that Father had pled guilty to a violation of possession of nitrous oxide (Pen. Code, § 381b), a misdemeanor, and received a sentence of 30 days in jail, two years of probation, a fine of \$150, and community service with Caltrans. He testified that he had the nitrous oxide cylinders as part of his business,

testing and repairing cylinders, and also testified that the truck was kept locked, and that only he had access to the keys.

The DCFS reports included accounts of several interviews with M. She told social workers that she had never been inside the truck or seen any unusual activity around the truck. She knew that Father worked with nitrous oxide and that he sold nitrous oxide from his truck. She knew this both because Father told her and because a friend told her. M. knew that people inhaled nitrous oxide, illegally, but said that Father did not sell nitrous oxide for the misuse, but sold it as part of his business, that the truck was kept locked, that Father did not want her to "be into" nitrous oxide and that her curfew was 8:30 p.m.

In the first interview, when she was told that Father had been arrested for selling nitrous oxide to minors, M. said that Father checked identification, but that it was difficult to detect false identification.

On her relationship with Father in general, M. said that Father took care of her, "The way a father should. He made sure I was fed, healthy, had what I needed for school, transport me to extra-curricular activities and to events with my friends."

M.'s testimony at the hearing was similar.

At the close of evidence, Father, Grandmother, and M. asked that all allegations be dismissed. The court found the witnesses not credible and sustained the petition under section 300, subdivision (b), on allegations that:

-- Father "created a detrimental and endangering situation for the child in that the father possessed Nitrous Oxide within access of the child. The child was exposed to illicit drug trafficking in the child's home by the father. On 11/13/2007, the father . . . was arrested for the sale of Nitrous Oxide. Such a detrimental and endangering situation established for the child by the father endangers the child's physical and emotional health, safety and well being and places the child at risk of physical and emotional harm."

-- Grandmother "created a detrimental and endangering home environment for the child in that she allowed the father of the child to reside in the family home where the father possessed Nitrous Oxide within access of the child. Further, the Legal Guardian

knew or reasonably should have known the father was selling Nitrous Oxide from the family home and allowed the father to expose the child M. to illicit drug trafficking. Further, on 11/13/2007, the child's father . . . was arrested for the sale of Nitrous Oxide. Such a detrimental and endangering situation established for the child by the Legal Guardian endangers the child's physical and emotional health, safety and well being and places the child at risk of physical and emotional harm and damage."

M. was ordered released to Grandmother and a dispositional hearing was set. In late April, before that hearing could take place, Grandmother told DCFS that she had been forced to vacate her apartment and could not find another place to live, except for a hotel. In the next days, Grandmother, Mother, and M. told DCFS that they believed that it would be in M.'s best interest to be placed with Mother, so that she could avoid living in a hotel. On May 6, the court made that order.

The dispositional hearing took place on May 22. For the hearing, DCFS recommended termination of the legal guardianship, based on Grandmother's age and medical situation. Grandmother submitted on the recommendation, and the court ordered DCFS to give the proper notices under the Probate Code.

DCFS also asked that M. be placed with her mother, with monitored visits for Father, individual counseling for M., and drug rehabilitation for Father. Both M. and Father argued that Father's visits should be unmonitored. Father opposed the drug program recommendation, pointing out that there was no evidence that he used drugs. The court indicated that it agreed with Father on this point, and DCFS asked, in the alternative, that Father be ordered to go into counseling to address the evils of addicting uninformed people to drugs.

The court ordered M. placed with Mother. Unmonitored visits were ordered for Father, and he was ordered to participate in a parent education program and individual counseling which addressed the "ramifications of illegal drug sales." Individual counseling was ordered for M.

## Discussion

Dependency jurisdiction may be asserted under section 300, subdivision (b) only if "The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . ." Father's argument is that there is no evidence here to support a finding that he failed to supervise or protect M., or that as the result of his conduct, she had suffered, or was at risk of suffering, serious physical harm.

The standard of proof at a section 300 hearing is the preponderance of the evidence and our review is for substantial evidence. (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 185.)

As to the failure to supervise or protect M., Father cites the evidence that M. was in good health and well taken care of, and the evidence that she had no access to his truck, and that she believed that his sales of nitrous oxide were legal and legitimate. There certainly was evidence that M. was well cared for, and that Father provided that care. However, we find substantial evidence for the finding in the very fact of Father's arrest. When Father was arrested, he, not Grandmother, was M.'s primary caregiver, and Grandmother was in the hospital. Although there were other adults in the house, they were not charged with M.'s care, and Father's arrest left her without a responsible adult in charge.

As to the physical harm requirement, we agree with Father that there is no evidence that his sales of nitrous oxide had in the past ever caused M. such harm. As to the risk of future harm, the trial court found that M. might in the future be harmed by a nitrous oxide explosion, or by a drug sale which "went bad," and that she could have broken into the truck and had access to the nitrous oxide.

As Father argues, there is no evidence in the record that there was a risk of explosion. However, we find substantial evidence that M. was at risk of harm. Father's activities meant that drug users were in close proximity to M.'s home. Further, the keys

which opened the truck were in his bedroom in the apartment. M. knew that teenagers used nitrous oxide as an inhalant, and a friend knew that her father sold nitrous oxide.

Except for the evidence that she had school attendance problems, which M. herself recognized as an issue, there is no evidence that M. was disobedient, or in trouble, or had any behavioral problem. Nonetheless, a teenager with M.'s knowledge and M.'s access to nitrous oxide, might well be tempted to use that dangerous drug, out of curiosity or peer pressure. That is risk of harm.

Father's final argument on the jurisdictional orders is that there was no evidence of current risk to M., given that his truck and the cylinders had been impounded, that there was no evidence that he was still involved in the sale of nitrous oxide. The problem with the argument is that Father had a previous conviction for possession of nitrous oxide. Confiscation of the cylinders did not mean that the risk had ended.

As to the dispositional orders, Father argues that there was no clear and convincing evidence that M. would be in substantial danger if she was returned to his home. (§ 361, subd. (c).) We agree with DCFS that Father forfeited this argument. At the dispositional hearing, he did not oppose M.'s placement with Mother, and he may not raise the issue now. (*In re Daniel D.* (1994) 24 Cal.App.4th 1823, 1831.)

#### Disposition

The orders appealed from are affirmed.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.